IN THE

Supreme Court of the United States

October Term, 1941

No. [redacted] 95

JOSEPH A. PIUMA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Parker & Baird Company, Law Printers, Los Angeles

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Opinion.

The opinion of the court below appears in 126 Fed. (2d) 601. A copy is included in the transcript. [R. 76-81.] Also, it is hereinafter excerpted, with comment, in the Summary Statement.

II.

Statement of Jurisdiction.

This court has jurisdiction under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, with amendments to June 29, 1938; and under Rule 38, 5(b), Rules of the Supreme Court.

The Circuit Court had jurisdiction under Section 128(a), "First," of the Judicial Code, *supra*.

The District Court had special jurisdiction of this action by the United States to recover special statutory penalties by virtue only of Section 5(*l*) and 16 (15 U. S. C. A., Sections 45(*l*) and 56), of the 1938 amendment to the Federal Trade Commission Act.

> The special right of action created by the above sections of the 1938 amendment is cognizable by a court only if the order is "final, and while such order is in effect." (See Sec. 5(*l*).)

The Federal Trade Commission, in 1934 and 1937, had jurisdiction only under original Section 5 of the Federal Trade Commission Act of 1914. (38 Stat. 717, 719.)

> Thereby, the Commission's jurisdiction reached only to the fact of "unfair methods in competition." "Deceptive acts or practices," eliminating the element of *competition*, and the inclusion therein of "false advertisement * * * inducing * * * the purchase of food, drugs," *et al.*, was added to the jurisdiction by the 1938 amendment, Section 5(a), and new Section 12(a) and (b), 15 U. S. C. A., Sections 45(a), and 52(a) and (b).

III.

Summary Statement of the Matters Involved.

Judgment Involved. This [R. 62-64] was ordered summarily [R. 52] (Rule 56, Federal Rules of Civil Procedure) by the District Court, Southern District of California, Central Division, on July 22, 1941, in a formal opinion, per Judge Jenney [R. 44-52]. It awarded [R. 44, 52] the penalties provided by the 1938 amendment, "45 U. S. C. A. 45(*l*)," to the Federal Trade Commission Act of 1914 (hereinafter called the Act). (38 Stat. 717.)

The Action. This was brought by the United States, April 24, 1940 [R. 27], based on an order of the Federal Trade Commission (hereinafter called the Commission), dated April 6, *1937* [R. 2-10]. The complaint incorporated, as exhibits: (1) the Commission's "Complaint," specifying particular advertisements [R. 10-14], and dated September 5, *1934* [R. 14]; (2) the "Answer" thereto [R. 15-18], which affirmatively challenged the Commission's jurisdiction [R. 16-17], particularly, in that the allegations [R. 16-17, "Par. One," etc.] of injured competition and competitor, and of "unfair method of competition," were pure conclusion or opinion [R. 17, "Three"], and prayed, *inter alia*, that the proceeding be dismissed for "lack of jurisdiction of the subject-matter" [R. 18]; and (3) the Commission's "Findings as to the Facts and Conclusion" [R. 18-27], also dated April 6, *1937* [R. 27]. The United States pleaded *new* particular advertisements, of 1938-1940, which, nevertheless, were alleged to violate the order [R. 7-9]. The *1938* amendment, "Sections 5(*l*) and 16" (45 U. S. C. A., Secs. 45(*l*), 56), was relied upon to recover the penalties claimed [R. 10].

Since his "Answer" before the Commission, and its attempt to procure dismissal of the proceeding, petitioner has always stood upon the defense there stated: The Commission was without jurisdiction, and any resultant order is void.

Petitioner's Pleadings. Petitioner moved *to dismiss* the Government's action, upon the grounds that: *first,* the Commission had been without any jurisdiction to act under the law in effect in 1934 and 1937, and the District Court itself was now without any jurisdiction other than to dismiss; and, *second,* no cause of action was stated under "Sections 5(*l*) and 16" of the amended Act [R. 33]. This was *denied* in a "memorandum of ruling" per Judge McCormick [R. 35-36], but "without prejudice to renew any applicable constitutional question herein at the time of the *hearing* of the action *on the merits*" [R. 36]. (Emphasis supplied.)

Petitioner also moved *to "vacate and set aside"* this denial, upon the fundamental ground that, on the face of the complaint as enlarged by its exhibits, the court was without jurisdiction to make any such order and the same was therefore wholly void [R. 37-38]. But this was not passed upon, until Judge Jenney denied it, in concluding his opinion, *supra* [R. 52]. These motions were supported by points and authorities.

Petitioner also *answered,* denying the terms of the advertisements relied upon by the United States violated the Commission's order in any event, and averring that, on the contrary, they showed he had sought to comply therewith, prior to any change in the law [R. 27-30]. Affirmatively, he pleaded the true content of the advertisements in question depended upon determination of the fact issue

of what may properly be designated "a tonic" possessed of beneficial remedial efficiency, an issue not hereinbefore raised or passed upon [R. 30-32]. Even the Commission's "findings" [R. 25-26] merely denied, generally, the preparation was "a gland tonic" while special findings [R. 21-23] showed that, by common knowledge, the compound appearing would have beneficial remedial efficiency, and the whole was no more than matter of the Commission's opinion. But, throughout, petitioner adhered to his primary defense, that the Commission's order was *wholly void* and of no effect, because made when, under the then existing law, the Commission had no jurisdiction, power or authority to entertain such a proceeding, or make such an order, upon the state of fact reflected in its own findings and, in any event, upon the facts actually provable [R. 28-29, pars. II, III, IV; R. 31, par. V].

Motion for Summary Judgment. This [R. 38], petitioner opposed [R. 39-40]. Supported by points and authorities, he first restated his ground, the order "is null and void," because "beyond any jurisdiction of the Commission;" and, second, urged "any breach" depends further upon a question of fact, whether the preparation possesses tonic capacity. He submitted his affidavit [R. 40-41] that, from his own extended experience, by that of actual users of the preparation, and by the testimony of experts, it was true the compound in question had produced the beneficial effects and results, and did possess the beneficial capacity claimed for it in the advertisements in suit. By the motion, all this was admitted to be true. The United States filed no affidavits. Judge Jenney's opinion, *supra* [R. 49-51], rejected petitioner's grounds, including his affidavit, and, in so doing, expressly relied on the 1938 amendment, particularly its provision making

the Commission's order "final," and the further provision for "a review" by the Circuit Court. (15 U. S. C.A., Sec. 45(g), (c), (d).) Findings and Conclusions were made accordingly [R. 52-62]. In the absence of a trial, and of any evidence in plaintiff's behalf, such findings necessarily rest upon and reflect only the case made in the pleadings, and the statutory provisions the court had invoked in its opinion, *supra*. It is noticeable there is no direct finding the advertisements actually related to or effected any *sales* in interstate commerce [R. 58-60, pars. IX, X].

Opinion on Appeal. This is very brief. It refers to no authorities. It disregards all petitioner's pleadings, except his answer. It ignores all his grounds for relief in such pleadings appearing. So, also, all the necessarily resultant deprivations of his constitutional rights, to conduct his business without unreasonable and unwarranted restraint or interference, and his freedom of speech and of press to advertise the fact of the same, as guaranteed by the Fifth and First Amendments of the Constitution. Likewise it completely eliminates all question of the constitutional duty of the District Court upon the case presented before it, to inquire independently whether the true state of fact in the case gave jurisdiction for the Commission's order, as a matter of "due process" under the Fifth Amendment. (*Crowell v. Benson,* 285 U. S. 22, 54-55, 56, 60-61, 76 L. Ed. 598, 614-615, 615-616, 617-618; 39 *Columbia Law Review,* 259, 272, notes 99 and 100, citing *Crowell v. Benson, ante.*)

After dubbing petitioner's preparation a "nostrum," and quoting the Commission's order, the gist is:

> "The order was served on appellant on April 10, 1937. No petition to review it was ever filed. It

therefore became final on May 20, 1938, and was at all times thereafter in full force and effect." [R. 77.]

Reciting the action, and quoting the new advertisements relied on as violations, the opinion continues:

"Answering, appellant admitted all material allegations of the complaint. There being no issue as to any material fact, appellee moved for a summary judgment. The motion was granted and judgment was entered in appellee's favor for $3,250 ($250 for each violation of the Commission's order) and for costs. From that judgment this appeal is prosecuted.

"The appeal is a frivolous one. Facts warranting the judgment were alleged in the complaint and admitted in the answer. Thus, instead of a defense, the answer was, in effect, a confession of judgment. There was and is no basis for an appeal. * * *

"Copies, admitted to be true copies, of the Commission's complaint and report are attached to and made part of appellee's complaint. Therefrom it appears that the Commission charged and found all facts essential to its jurisdiction. Its findings are not here open to review." [R. 78-79.]

This is in complete disregard of all of petitioner's other pleadings, and the matters of defense raised thereby.

To support its statement [R. 79, note 4]: "the Commission charged and found all facts essential to its jurisdiction," the opinion sets forth what was so "charged and found" regarding competition, to-wit: "in competition with persons, firms, partnerships and corporations" (specifying or indicating none in particular, and thus covering generally every possible busi-

ness entity)—"in the interstate sale of other preparations used and useful"—(again specifying nothing, and simply covering the entire field of remedial "preparations" occupied also by petitioner). The note's statement here is accurate. The Commission did, actually, so charge [R. 12] and find [R. 21], and it made no other findings in that regard. But the court does not note that this very form of broad generalized charge, findings and evidence is that which was condemned by *Federal Trade Commission v. Raladam Co.* (1931), 283 U. S. 643, 653, 75 L. Ed. 1324, 1332, as being merely "matter of conjecture," and wholly ineffective and insufficient to supply the indispensable element of injury to competition and competitor. The court does not even mention the case. Yet it was the law in 1934, when the complaint was filed, and in 1937, when the order was made. The 1938 amendment made the first change therein: by eliminating the element of competition, when "deceptive acts or practices" were concerned. (15 U. S. C. A., Sec. 45(a), and new Section 52(a) and (b).)

Also, regarding the subject-matter of the proceeding itself, the same note states it was "charged and found" [R. 80]: petitioner was "making the representations from which the Commission ordered him to cease and desist;" which "were false and misleading and constituted unfair methods of competition in commerce." This statement, however, is not wholly accurate. It does not appear the court made any analysis of the complaint and order, or their context in the entire record. Such shows that the findings [R. 25, "Paragraph Four," first part]—which were

carried verbatim into the order in ten numbered items [R. 5-6]—departed from the particular ten numbered items specifically stated in the complaint [R. 12-13]. This was accomplished by combining numbers 5 and 6 of the complaint [R. 12], with interpolations of "in gland remedies" [R. 25, and R. 6, No. 5], and providing a wholly new number 10 [R. 25, and R. 6, No. 10]. This resulted in a finding, and entry in the order, upon an issue not tendered in the complaint and, therefore, a finding inadmissible. But, further, analysis also reveals that the ultimate finding is: that "said preparation Glendage does not possess *the therapeutic efficacy* represented and implied by the respondent" [R. 26] (emphasis supplied). This, however, states no more than the Commission's *opinion,* not any fact, as to "the" extent of efficacy, and does not state there was none in beneficial amount. And previously [R. 21-23], as basis for this, there appear findings of specific fact, setting forth the various ingredients and quantities compounded into the preparation. By common and judicial knowledge, the combination stated would have tonic efficacy, and the findings themselves provide one source of such information: "U. S. P." (United States Pharmacopœia) [R. 22, 23]. They also state the content included "glandular" substances [R. 22, 23]. Thus the "unfair method," "charged and found," related not to a subject-matter of fact, to some substance or article falsely passed off as something else; but only to a matter of opinion, concerning the extent of remedial efficacy of a medicinal preparation compounded of various active elements. It is very noticeable it is *not* charged the preparation was dangerous, or needed medical direction in taking; or that it was

fraudulently represented; or even that petitioner knew, or had reason to know, his representations were essentially false. The gist of the findings is: that, by reason of its lack of "the efficacy," purchasers were "misled and deceived" in buying Glendage; *not* that they bought it, while desiring, or intending to buy, some other known or established article or substance [R. 26, "Five"]. But matters of *opinion* on the part of the Commission, concerning matters of the character of the foregoing, were not within the Commission's jurisdiction in 1934 and 1937.

The opinion concludes:

"Because the Commission's order was prior to the enactment of 5(*l*) of the Federal Trade Commission Act, 15 U. S. C. A. 45(*l*), under which this action was brought, appellant contends that 'the award of penalties was *ex post facto* and constitutionally void.' There is nothing in the point; for, although the order was prior, appellant's violations of the order were subsequent to the enactment.

"Other contentions made by appellant are so devoid of merit as to require no discussion." [R. 80-81.]

The foregoing does not truly state what petitioner "contends" regarding *"ex post facto."* Instead, he maintains that the District Court's grant of *summary judgment* for the penalties of the 1938 amendment deprived him of his defense that the Commission's order was void *ab initio,* and that, through such deprivation, the amendment's various provisions were so applied, under the guise of a "procedural change," as to constitute a violation of the constitutional inhibition of federal legislation *ex post facto,* within the principles of the controlling authorities petitioner cited.

Likewise, it is not true that "Section 5(*l*) was added to the Federal Trade Commission Act by 1107 of the Act of June 23, 1938, c. 601, 52 Stat. 1028." The latter statute was the "Civil Aeronautics Act of 1938." In subsection (f) of Section 1107 thereof, section *5(a)* of the Federal Trade Commission Act was "further amended" by insertion therein of the words: "air carriers subject to the Civil Aeronautics Act of 1938." "Section *5(l)*" was enacted by Public No. 447, 75th Congress, March 21, 1938, 52 Stat. 111, 114, and has since remained unchanged. Perhaps the court was misled by the citations appearing at the end of Section 45(*l*) of 15 U. S. C. A.

Petition for rehearing was filed, but denied April 15, 1942 [R. 82]. Hence, this petition for certiorari.

IV.

Statement of Questions Presented.

The basic problem here is this: Where the sole and express purpose of an order of the Commission—(made *only* under the authority granted by the original Act of 1914 and resting *only* on the "findings of fact" here appearing)—is to restrain and restrict the conduct of a business and the manner and method of its advertising of a compounded medicinal preparation, and where, in an action by the United States on such order to recover penalties for alleged violations of the order by new advertising—(brought *only* under express provisions of the 1938 amendment of the Act)—not only any violation is denied by petitioner as a matter of fact, but the validity of that order is challenged—(as theretofore before the Commission)—on the ground that it is utterly *void* because made beyond any jurisdiction of the Commission in the premises, how and how only, under the Constitution of the United States, must that action, and particularly that challenge of the order's validity, be tried and disposed of by the court in which the action was brought by the United States?

Essential in the solution of this problem are the following questions, which are presented to justify review by this Court. Each of these is framed to include different classes of fundamental objections urged against this judgment, and the affirming opinion.

1. *Is not this summary judgment wholly unjustified and insupportable, and its sanction by the Circuit Court wholly erroneous, because of its conflict with fundamental constitutional requirements and provisions, and the applicable decisions of this Court, in each of the following respects?*

(a) No administrative agency, even a "legislative court," can exercise, or be authorized to exercise, the constitutional judicial power established by Article III, Sections 1, 2, of the Constitution, as declared by this Court in *Williams v. United States,* 289 U. S. 553, 561, 565, 581, 77 L. Ed. 1372, 1374, 1376, 1385; *O'Donoghue v. United States,* 289 U. S. 516, 529-530, 535-536, 544-545, 550-551, 77 L. Ed. 1356, 1360, 1363, 1367-1368, 1370-1371; *Ex parte Bakelite Corp.,* 279 U. S. 438, 449-450, 451-452, 459, 460-461, 73 L. Ed. 789, 793, 794, 797, 798; and related cases. See *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, 648(4), 649(7).

(b) When there is question of the jurisdiction, *i. e.,* "the right to *adjudicate* concerning the subject-matter" (emphasis supplied), of an administrative agency to deprive a person of rights and freedom guaranteed by the Constitution or its amendments, the "due process"—"day in court"—guaranteed by the Fifth Amendment can be satisfied only by the determination of a constitutional court exercising constitutional judicial power, and such a court must necessarily make its determination *de novo,* else there is no independent determination, as declared by this Court in *Crowell v. Benson,* 285 U. S. 22, 45-46, 56-57, 60-61, 63-64, 76 L. Ed. 598, 609-610, 615-616, 617-618, 619-620; *St. Joseph Stock Yard Co. v. United States,* 298 U. S. 38, 49-50, 51-53, 80 L. Ed. 1033, 1040, 1041-1042; *United States v. Idaho,* 298 U. S. 105, 109-110, 80 L. Ed. 1070, 1074-1075; and related cases. See *Federal Trade Commission v. Curtis Publishing Co.,* 260 U. S. 560, 580, 67 L. Ed. 408, 413. Compare *Shields v. Utah Idaho R. Co.,* 305 U. S. 177, 184-185, 83 L. Ed. 111, 117. See, also, *Reynolds v. Stockton,* 140 U. S. 254, 268, 35 L. Ed. 464, 468.

(c) To construe the provisions of the 1938 amendment as a Congressional attempt to empower the Commission to make final adjudication of the matter of its own jurisdiction—as distinguished and differentiated from decisions arrived at within unquestioned jurisdiction—is to render the amendment unconstitutional in that respect and to that extent, and should be avoided, as declared by this Court in *Crowell v. Benson, supra,* at 46, 49, 54-55, 56, 58, 62, 76 L. Ed. at 609-610, 611, 614-615, 616, 617, 619; *St. Joseph Stock Yard Co., supra,* at 50-51, 80 L. Ed. at 1040-1041; and related cases. See, also, *United States v. Idaho, supra,* and *Shields v. Utah Idaho R. Co., supra.*

(d) To so construe and apply the altered procedural provisions of the 1938 amendment (15 U. S. C. A., Secs. 45(*l*) and 56) as to deprive the defendant of his vested right of defense grounded in the *ab initio* void character of the Commission's order, and visit him with penalties thereby, rendered that part of the amendment a violation of Article I, Section 9, Clause 3, of the Constitution, prohibiting Congressional legislation *ex post facto,* and it is immaterial that the penalties be called "civil," or that the particular act involved be not a "crime" in any strict sense, as declared by this Court in *Thompson v. Utah,* 170 U. S. 343, 351-352, 42 L. Ed. 1061, 1067; *Cummings v. Missouri,* 4 Wall. 277, 325, 18 L. Ed. 356, 363-364; *Burgess v. Salmon,* 97 U. S. 381, 385, 24 L. Ed. 1104, 1106; *Ex parte Garland,* 4 Wall. 333, 377-378, 18 L. Ed. 366, 369-370; and related cases. See, also, *Lindsey v. Washington,* 301 U. S. 397, 401, 81 L. Ed. 1182, 1186.

2. *Is not this summary judgment further unjustified and improvident, and its sanction by the Circuit Court further erroneous, because in conflict with the principles and rules governing the jurisdictional requirements of the Act of 1914, and applicable decisions of this Court, and of other circuits, in the following respects?*

(a) Any order of the Commission under that Act can only be supported, as being within its jurisdiction, by specific findings of fact establishing injury to identified competition and identifiable competitor, and this element is primary and indispensable, as declared by this Court in *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, 644-646, 653-654, 75 L. Ed. 1324, 1328, 1332, and related cases; and as held by the Circuit Court, 6th Circuit, in *Raladam Co. v. Federal Trade Commission,* 42 Fed. (2d) 430, 434-435 (second *Raladam* case). Although certiorari was granted in this case (86 L. Ed. (Adv. Ops.) 562, memo.), it is not presumed such will affect the principles applicable here. See, also, *Federal Trade Commission v. Curtis Publishing Co.,* 260 U. S. 568, 577-579, 580-581; *Federal Trade Commission v. Royal Milling Co.,* 288 U. S. 212, 214-215, 216, 77 L. Ed. 706, 707-708, 709.

(b) To be within the subject-matter or class of cases contemplated by that Act, any order must be supported by findings dealing only in terms of established and stated facts, and not merely in matters of *opinion* formed upon indeterminate and inconclusive, and even contradictory, factual conditions, *i. e.,* as in the present case, the extent of remedial efficiency of a medicinal preparation compounded of various active elements, as declared by this Court in *American School etc. v. McAnnulty,* 187 U. S. 94, 104-105, 105-106, 106-107, 108, 109-110, 110-111, 47 L. Ed. 90, 94-95, 95, 96; and related cases (the case itself

having been cited more than one hundred times in its various aspects); and as recognized by the Circuit Court, 6th Circuit, in *Proctor and Gamble v. Federal Trade Commission,* 11 Fed. (2d) 47, 48(2)

(c) To satisfy the legal measure and standard of the "findings of fact" required of any administrative agency, to establish that its action has been *within* its particular jurisdiction, and therefore "conclusive" and to that extent "final," such "findings" must be precise and exactly indicative, not merely general, vague or speculative, and therefore "aribitrary and capricious;" otherwise the action taken by the agency will be tested and disposed of in a court in any manner appropriate in the case, as particularly declared by this Court in *Federal Radio Commission v. Nelson Bros. etc. B. & M. Co.,* 289 U. S. 266, 277, 77 L. Ed. 1166, 1174; *Florida v. U. S.,* 282 U S. 194, 212-213, 75 L. Ed. 291, 303; *Fed. Trade Commission v. Raladam Co.,* 283 U. S. 643, 652-653, 654, 75 L. Ed. 1324, 1332; *Federal Trade Commission v. Curtis Pub. Co.,* 260 U. S. 568, 582, 67 L. Ed. 408, 414; *Crowell v. Benson,* 285 U. S. 22, 49-50, 63, 76 L. Ed. 598, 612, 619.

3. *Is not this summary judgment still further unjustified and unsupported, and its sanction by the opinion of the Circuit Court still further erroneous, and in conflict with established principles of law and procedure, and with the decisions of this and other courts, in the following respects?*

(a) An order or judgment which is void on its face is a mere nullity in any event; but, further, when an action is brought upon an order or judgment which is void for lack of jurisdiction, such action may be defended against in any appropriate manner, even by evidence *de hors* the record on which the action is founded in its pleadings,

and contrary to the recitals therein, as declared by this Court in *Thompson v. Whitman,* 18 Wall. 457, 467-468, 21 L. Ed. 900, 901; *Reynolds v. Stockton,* 140 U. S. 254, 264-265, 35 L. Ed. 464, 467; *Bigelow v. Old Dominion Copper Co.,* 225 U. S. 111, 134, 56 L. Ed. 1009, 1024; *National Exchange Bank v. Wiley,* 195 U. S. 257, 270, 49 L. Ed. 184, 190; and related cases.

(b) For purposes of summary judgment under Rule 56(c), Rules of Civil Procedure, a court is limited to determination of whether there is any genuine issue of fact, any "arguable defense," or matter of "ambiguity," involved by the pleadings and affidavits in a given case, and is precluded from making disposition of such an issue in any event. (*Saunders v. Higgins* (D. C. N. Y., 1939), 29 Fed. Supp. 326, 328(7); *Chas. Blum Adv. Corp. v. Mayers Co.* (D. C. Pa., 1939), 25 Fed. Supp. 934, 935; *Kent v. Hanlin* (D. C. Pa., 1940), 35 Fed. Supp. 836, 837. Compare *Port of Palm Beach Dist. v. Goethals,* 104 Fed. (2d) 706. See, also, *McComsey v. Leaf,* 36 Cal. App. (2d) 132, 140, and *Walsh v. Walsh,* 18 Cal. (2d) 439, 441(1), 442(2a), 444(2b), 443-444(3, 4, 5). The Federal Rule and the California statute follow substantially the New York statute.)

But, by reason of petitioner's rights in his defenses against the void order, the court in this case was particularly precluded from wholly rejecting the issues tendered, and from basing its rejection on the assigned grounds, that the order defended against was "final" and "*res adjudicata*" [R. 49], and the proffered "evidence should have been submitted * * * before the Commission" [R. 50]. As was his right, petitioner throughout had stood upon his repeatedly-pleaded defense that both the charge and the order were without jurisdiction, and the order was wholly void for that reason.

V.

Reasons for Issue of the Writ.

Upon the foregoing, it is urged this Court should review this case for the following reasons within the principals of Rule 38, 5(b), of the Rules of the Court:

1. A Federal Statute is involved, to-wit, the 1938 amendment to the Federal Trade Commission Act, the proper interpretation and construction of which presents a vitally important question.

2. The District Court has put upon that statute ,and the Circuit Court has sanctioned, a construction which probably renders it unconstitutional in at least one of its aspects and purposes, in that, by such construction, it is made to confer on the Federal Trade Commission the power to adjudicate finally the question of its own jurisdiction, even when constitutional rights and freedoms of a defendant are thereby lost, contrary to the most fundamental principles and mandates of the Constitution, and the decisions of this Court hereinbefore specified.

3. Also, the District Court has made, and the Circuit Court has sanctioned, a construction of that statute which probably brought it in conflict with the Constitutional inhibition of legislation *ex post facto,* in that the statute, by such construction, is made to operate to deprive a defendant of a vested right in his defense against an action brought on an order of the Commission: that that order had been void *ab initio;* and to visit him with penalties accordingly, contrary to decisions of this Court hereinbefore specified.

4. The decisions of the District Court, and of the Circuit Court, are each in probable conflict with various decisions of this Court and of other circuits, in the re-

spects hereinbefore specified, and therefore this Court should exercise its supervisory powers to restore and preserve harmony of decision and precedent.

5. As hereinbefore specified, the District Court has disregarded and departed, and the Circuit Court has sanctioned such disregard and departure, from established principles and practices of procedural law, in respect to defenses against void judgments and orders, and also in respect to the granting of summary judgments, again justifying an exercise of this Court's supervisory powers.

Conclusion.

Thus far, in every court and at the hands of every judge that has dealt with it, this case has been made to fit into a single pattern. Apparently by the merest inspection of the Commission's proceedings, certainly without any analysis thereof or demonstration thereby, and most certainly without any consideration of other material and pertinent facts, even those of common and judicial knowledge, it has been repeatedly and consistently stated and held: that the Commission's proceedings met and showed all "requirements" [R. 35-36], "prerequisites" [R. 47-48], and "facts essential" [R. 79, note 4], to the exercise of its jurisdiction; that, because no "review" of the order, as permitted by the Act both before and after the 1938 amendment, was ever had, such order, by other provisions of that amendment, became "final," and thereafter immune to any attack, any time, anywhere or in any proceeding [R. 36, 48-51, 77, 79]; and that, thereby, in this case, a summary judgment on the plaintiff's complaint based on the Commission's proceedings was proper, regardless of the particular fact issues tendered, and also regardless of all constitutional questions involved [R. 52,

78, 80-81]. It is submitted that, within the Constitution, the question of the Commission's jurisdiction has never been adjudicated in any court.

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court had in the case numbered 9934 and entitled "Joseph A. Piuma, Appellant, v. United States of America, Respondent," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and the judgments herein of the Circuit Court and of the District Court be reversed by this Court; and, in view of the matters hereinbefore appearing, it is further prayed that such reversal be with directions to the District Court to dismiss the action.

Dated May 15, 1942.

LOUIS J. CANEPA,
Attorney for Petitioner.

C. M. CASTRUCCIO,
HORACE W. DANFORTH,
Of Counsel.

State of California, County of Los Angeles—ss.

Louis J. Canepa, being first duly sworn, deposes and says: That he is one of the attorneys for Joseph A. Piuma, petitioner herein; that he has caused the foregoing petition to be prepared, and is familiar with the same; that it is filed in good faith, and possesses merit, as he verily believes.

LOUIS J. CANEPA.

Subscribed and sworn to before me this 15th day of May, 1942.

RUTH A. VETTER,
Notary Public in and for Said County and State.

Due service of the within petition is hereby acknowledged this.....day of May, A. D. 1942.

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Attorneys for Respondent.

5-15-42—60

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CITATIONS

465307—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 95

JOSEPH A. PIUMA, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 44) is reported in 40 F. Supp. 119, and the opinion of the Circuit Court of Appeals (R. 76) is reported in 126 F. (2d) 601.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 9, 1942, and petition for rehearing was denied April 8, 1942 (R. 81–82). Petition for writ of certiorari was filed May 19, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether an order of the Federal Trade Commission directed against unfair methods of competition requires for its support a finding of specific injury to identified competitors.

(2) Whether the provisions of the Act of March 31, 1938, which impose a penalty for violating an order by the Federal Trade Commission after expiration of the time allowed for obtaining judicial review, are unconstitutional.

STATUTES INVOLVED

The first two paragraphs of Section 5 of the Federal Trade Commission Act, 38 Stat. 717, 719, provided, prior to this amendment by the Act of March 21, 1938:

> * * * unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Section 3 of the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C., sec. 45, amended Section 5 of the Federal Trade Commission Act so as to read in part as follows:

> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of

competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * *

* * * * *

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

* * * * *

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Section 5 (a) of the Act of March 21, 1938, provides:

In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section

5 (c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act.

STATEMENT

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, provides that any person violating an order issued thereunder after the order has become "final" shall be liable to the United States for a civil penalty of not more than $5,000 for each violation. The present proceeding is an action by the United States to recover such penalty. Petitioner's answer admitted all the material allegations of the Government's complaint (R. 27–30) and the United States thereupon moved for summary judgment on the pleadings (R. 38).[1] The District Court granted this motion and entered judgment for the United States in the amount of $3,250, or $250 for each violation (R. 52). The Circuit Court of Appeals affirmed, characterizing the appeal as "frivolous" (R. 78, 81).

The following facts set forth in the Government's bill of complaint are undisputed:

On April 6, 1937, the Federal Trade Commission, after a hearing on a complaint issued by it in 1934 charging petitioner with violating Section 5 of the

[1] Rule 56 (a) of the Rules of Civil Procedure provides:

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

Federal Trade Commission Act, made findings of fact and entered an order directing petitioner to desist from making certain specified representations in connection with the interstate sale of a medicinal preparation known as Glendage (R. 3–6, 27–29). The Commission found that petitioner's product is sold in interstate commerce in substantial competition with other products which are sold to the public as useful in the treatment of ailments for which Glendage is represented to be an effective treatment (R. 20–21). The Commission also found that misrepresentations made by petitioner concerning his product induced the erroneous belief on the part of many persons that petitioner's product "is a competent and effective treatment or corrective for use in remedying the ailments and conditions for which it is recommended," and caused a "substantial portion" of such persons, because of such erroneous belief, to purchase his product, "thereby unfairly diverting trade" from competitors who truthfully represent their preparations, to the substantial injury of these competitors (R. 25–26).

Petitioner did not on or before May 20, 1938, file any petition for review of the order of April 6, 1937, and the order became final within the meaning of the Act of March 21, 1938 (R. 6–7, 29).[2]

[2] Section 5, as amended by the Act of March 21, 1938, provides in subsection (g) that orders of the Commission under that section become final if no petition to review the order

Subsequently, petitioner on 13 different occasions published in newspapers having an interstate circulation an advertisement which violated the Commission's order of April 6, 1937 (R. 7–10, 29–30).[3]

ARGUMENT

1. Petitioner contends (Pet. 15) that the Commission had no "jurisdiction" to enter an order under Section 5 in the absence of "specific findings of fact establishing injury" to identified competitors and that the order of April 6, 1937, not being supported by such findings, is void.

Petitioner's contention is not timely. Under the Act of March 31, 1938, the Commission's order has become final. Since petitioner failed to petition for review as required by Section 5 (g), he cannot now attack the sufficiency of the Commission's findings.

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is filed within the time allowed therefor (*supra*, p. 3). The Act also provides that, in the case of orders issued and served prior to its enactment, the time allowed for filing a petition for review is 60 days from the date of enactment, in other words, until May 20, 1938 (*supra*, pp. 3–4).

[3] Petitioner admitted the publications as alleged in the complaint but averred that the advertisement as set forth therein shows on its face that it did not violate the order of April 6, 1937 (R. 29–30). The issue of fact thus raised, which requires for its determination solely a comparison of the words of the advertisement with the text of the Commission's order, was decided adversely to petitioner by both the District Court (R. 51) and the Circuit Court of Appeals (R. 80), and the petition for writ of certiorari does not request review of this question of fact.

But in any event, petitioner's contention is without merit and has been squarely rejected by this Court. *Federal Trade Commission* v. *Raladam Co.*, No. 826 this Term, decided April 27, 1942, sustained the adequacy of findings as to injury to competitors which closely parallel, both in form and substance, those on which the order here in question is based. The Court there held that it is sufficient if, as in the present case, there are findings that other products are sold to the same type of trade and class of customers as the misrepresented product and that the misrepresentations tend to divert trade from the sellers of such other products. See also *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 651.

Petitioner also seems to contend (Pet. 15–16) that the Federal Trade Commission Act does not authorize the Commission to enter any order based upon findings as to the remedial efficacy of a patented preparation. The two *Raladam* cases, which involved orders based upon findings of this nature, clearly dispose of this contention.[4]

2. Petitioner appears to contend (Pet. 13) that since the Act of March 21, 1938, provides a penalty for violating orders of the Commission, it unconstitutionally vests judicial power in the Commission.

[4] A like contention was unsuccessfully advanced as a ground for granting certiorari in *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 77 F. (2d) 886 (C. C. A. 2), certiorari denied, 296 U. S. 617, and in *Alberty* v. *Federal Trade Commission*, 118 F. (2d) 669 (C. C. A. 9), certiorari denied, 314 U. S. 630.

But under the act the penalty applies only to violations occurring after expiration of the time allowed for obtaining judicial review or after court affirmance of the order. Imposition of a penalty to secure enforcement of an administrative order, where the defendant is given the right to obtain judicial review of the order but fails to exercise this right, does not convert the order into the equivalent of a court decree. *Ostler Candy Co.* v. *Federal Trade Commission,* 106 F. (2d) 962, 964, (C. C. A. 10), certiorari denied, 309 U. S. 675.[5] The statute only provides a remedy for enforcement if the person against whom the order was entered does not initiate a court proceeding to have the order set aside. Other important federal statutes of long standing have thus provided penalties for violation of administrative orders where the defendant has failed to exercise his statutory right to obtain judicial review. See the Packers and Stockyards Act of August 15, 1921, secs. 205, 306 (g), (h), 314 (a), 7 U. S. C., secs. 195, 207 (g), (h), 215 (a); Interstate Commerce Act as amended, secs. 1 (17), 16 (8), 49 U. S. C., secs. 1 (17), 16 (8).

Since the Act of March 21, 1938, makes adequate provision for judicial review of orders of the Com-

[5] For other cases sustaining the constitutionality of the provisions of the Act of March 21, 1938, relating to enforcement of orders of the Commission, see *National Candy Co.* v. *Federal Trade Commission*, 104 F. (2d) 999, 1004 (C. C. A. 7), certiorari denied, 308 U. S. 610; *Ritholz* v. *March*, 105 F. (2d) 937, 939 (App. D. C.).

mission it fully satisfies the requirements of due process. *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597. And petitioner's contention (Pet. 14) that the statute imposes an *ex post facto* penalty is equally without merit since his violations were subsequent to enactment of the legislation.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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U. S. GOVERNMENT PRINTING OFFICE: 1942

(14)

IN THE

Supreme Court of the United States

October Term, 1942.

No. 95

JOSEPH A. PIUMA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION.

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PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION.

I.

Primary Criticism of Respondent's Brief.

Respondent's brief falls into the "pattern" pointed out in the petition's "Conclusion" (pp. 19-20). It is indeed, no more than a paraphrase of the Circuit Court's opinion, except it cites some decisions; whereas that opinion offers none. [R. 76-81.] All emphasis appearing is supplied, unless otherwise credited.

"QUESTIONS."

The "pattern" proclivity is exemplified in the briefs' "Questions Presented" (p. 2). Only two are stated; and each is both inaccurate and inadequate, for any purposes hereof.

Most conspicuously, both "Questions" *omit* any reference to or suggestion of the question which, at this stage, lies at the threshold of this case, namely, the question of the *right* and *power* of the District Court to grant *the summary judgment* which is the subject matter of the present proceeding. Nevertheless, that question appears as the culmination of the Petition, on the grounds that, upon the *pleadings* before the court, such grant was not within the intent, purpose and scope of Rule 56 (c), Rules of Civil Procedure, and was wholly contrary to the principles and decisions of every case expounding and applying that rule, and the grant of summary judgment generally. (Pet. 17, "3" (b); 19, "5" and "Conclusion"; also 3, "Judgment Involved"; 5-6, "Motion for Summary Judgment".)

This is indeed striking, since those pleadings challenge not only the jurisdiction of the court to do other than *dismiss* the action because the Commission *in law* had lacked jurisdiction on the face of the pleaded record showing the existing findings (Rule 12 (b), Rules of Civil Procedure), *but also* challenge the Commission's jurisdiction *in fact*, because, on a *trial* of the Government's action, *evidence* dehors the record would be available to disprove the order's alleged basis. (Pet. 16, "3", (a).) (*Thompson v. Whitman*, 18 Wall. 457, 467-468.)

But this is even still more striking because those same pleadings interpose to the Government's action, based on alleged violation of the Commission's order by *new* advertisements, the *affirmative fact defense* [R. 30-32], particularly "V", to-wit: that such *new* advertisements, by their *own* terms, did not and could not, *in fact*, violate the order (whether entered with or without jurisdiction). This, because they did no more than represent petitioner's preparation to possess remedial value as "a gland tonic," capable of beneficially stimulating gland activity and energizing and motivating human body reactions. This, "in truth and in fact," the preparation can be shown to possess, both in composition and in operation and effect, when the *fact* thereof is *tried* and determined. And thereby, the use of the term in advertising, directly or indirectly, could not be validly inhibited in any event. (Pet. 4-6, 16-17, "3".)

But also, "Question (1)" is inaccurate: The point is *not*, that "a finding of *specific injury* to identified competitors" is required. But is, that findings of *specific facts, to induce and support conclusions of injury* to identified *competition* and identifiable competitors, are essential. Such are indispensable to show the Commission's complaint and order were each actually had *within* the limits of the authority granted by the Act of 1914; thereby to show a *valid* exercise of that *limited* power. (Pet. 3-4, "The Action"; 7-8; 15-16, "2" (a) and (c).)

"(1)" is further inaccurate: It *assumes*, as if undisputed, the Commission's order was, actually, "directed against *unfair methods* of competition." Whereas, from the outset before the Commission, petitioner has everywhere insisted the "methods" charged and found were *no*

matters of *fact* whatsoever, but lay solely and entirely in the Commission's unsupported *opinion* of the *extent* of the *therapeutic efficacy* of petitioner's *medicinal compounded preparation,* which is of itself mere matter of opinion; and that such matter of *opinion,* as the basis of any proceeding, was wholly *beyond* any authority granted, which contemplates *only* matters of *fact;* whereby the whole proceeding and order was without jurisdiction and utterly void. This question is presented, is fundamental and vital, and must be considered, as well as the one pointed out *supra.* (Pet. 3; 8-10; 15-16; "2"(b) and (c).)

"(1)" is also inadequate: Manifestly, it neglects and obscures the effect of a *statutory limitation* of jurisdiction such as affects the Commission, an administrative agency; and also the effect of any attempted exercise of power beyond such limits. Therefore, the question is not cast in terms appropriate to bring forward the real issues here involved. Instead, since it purports to cover at least half of the field of the petition, it serves only to tender a substitute issue which in its effect is wholly fictitious. The actual issues are classified and presented in the petition (pp. 12-17).

So also, regarding the second stated "Question":

"(2)" is inaccurate: There is involved *not merely* the constitutionality of the 1938 amendment's imposition of "a penalty for violating an order" of the Commission, "after expiration of the time allowed for obtaining judicial review" of the order, and none such has been had. Instead, such a statement ignores some of the most vital and fundamental questions in the case. In particular, it *begs* the primary questions: whether there was, in fact, any *"violation"* of the order; and whether, in any event, such or-

der ever had any *validity* whatever. It thus continues the policy and procedure last above noted in respect to "Question (1)."

"(2)" is likewise inadequate in respect to all the following questions:

a. The *nature* and *limits* of the judicial *function* exercisable by an administrative agency, and its *incompetency* to be vested with, or to exercise, the *constitutional judicial power* established by Article III, Secs. 1, 2, of the Constitution. (Pet. 12-13, "1"(a).)

b. The *incompetency* of an administrative agency to afford the "due process" of the Fifth Amendment of the Constitution *to adjudicate* property rights and the freedoms guaranteed by the Bill of Rights. (Pet. 13, "1"(b).)

c. The *unconstitutionality* of the 1938 amendment, *if* it is construed to vest power in the Commission to determine its *own jurisdiction* where such is *controverted*, so that its orders in that regard may become *"final"* and be treated as *res adjudicata* of the Commission's jurisdiction. (Pet. 14, "1"(c).)

d. The *unconstitutionality* of a construction of the "procedural provision" of the 1938 amendment which permits its "penalty" provision—based on the theory the Commission's order was "final"—*to deprive* a defendant of the vested right of *defense:* that an order of the Commission on which an action has been brought is *void ab initio*, for *lack* of any jurisdiction in the Commission. (Pet. 10-11; 14, "1"(d).)

e. The *utter nullity* of a judgment or order rendered without jurisdiction of the subject matter, and the resultant *right to defend* against *any action* based on such a judgment, in any appropriate manner, and even by *evidence*

dehors the record on which the judgment is pleaded to rest. (Pet. 16-17, "3"(a).)

It has already been noted that "(2)" like "(1)" omits any reference to the question of the error in *granting* this summary judgment.

Thus, "(2)" also presents only a fictitious issue, which conceals, rather than reveals, the true issues here involved. Both questions are thus unserviceable.

"STATUTES."

The brief (pp. 2-4) cuts its "statutes" to fit its "questions" thus made to appear—especially in respect to the Act of 1914.

Since it is essential to *recapture the atmosphere and the aspect of the law at the time* (1934-1937) material to some of the problems vital in this case, section 5 of that Act, in full except for the last paragraph on service of process, appears hereinafter as "Appendix A", with appropriate emphasis supplied.

"STATEMENT."

The brief's "Statement" (pp. 4-6) adheres to the "pattern." With much greater elimination, it follows the opinion's already drastically restricted lines.

Ignoring all other pleadings and proceedings, it says, p. 4: "Petitioner's *answer* admitted all the *material* allegations of the Government's complaint", for a "penalty", under "Section 5 * * * as amended March 21, 1938." But *what* "allegations" are regarded as "material" are not pointed out, or otherwise disclosed. The statement, therefore, is an unsupported conclusion, without indicated

content. Pure conclusion also, is the statement (p. 6): "Subsequently, petitoner * * * published an advertisement which *violated* the Commission's order of April 6, 1937."

Both ignore petitioner's pleaded defense, that the *new* advertisements did not, in fact, violate the order of 1937 —when the *fact question* of what may properly be designated "a tonic" is *tried* and determined. Nor do they appear violative, when the true *content* of the order, and of the new advertisements, is each *analyzed and compared*— when the result of such determination is taken as a factor. (Pet. 4-5; 8-10.) It is unnoticed in the "Statement," as in the opinion, that the truth or falsity of the *new* advertisements depends wholly upon whether petitioner's preparation has potentiality as "a gland tonic", or "gland tablet." An analysis of the original charges in the "complaint", the terms of the "order", and of the *new* advertisements in the Government's action, appears hereinafter as Appendix B.

The "Statement" (p. 4) notes grant of the summary judgment, and, in appended note "1", quotes "Rule 56(*a*) of the Rules of Civil Procedure." But (c) of that Rule is *not* mentioned. It should be. Pertinent to a grant, it declares:

> "The judgment sought shall be rendered forthwith *if* the *pleadings*, depositions, and admissions on file, together with the *affidavits*, if any, show that, except as to the amount of damages, there is *no genuine issue as to any material fact* and that the moving party is *entitled* to a judgment *as a matter of law*."

It is gratuitous assumption that even the "answer admitted" the requisite basis of a grant. But the answer

and other pleadings in the case, particularly including the exhibits in the Government's complaint, and petitioner's motion to dismiss (Rule 12(b), Rules of Civil Procedure), and his opposition to summary judgment, establish no such basis existed. There was "issue as to * * * material *fact,*" regarding both jurisdiction and violation—as well as at law. (Pet. 4-5; 8-10; 16-17; "3"(a) and (b).) And also, as Judge McCormick recognized, and reserved right in respect thereto in denying dismissal, there were *constitutional questions* for determination on " 'the *hearing* of the action *on the merits*'." (Pet. 4.)

The brief (p. 4) then notes: "The Circuit Court affirmed, characterizing the appeal as " 'frivolous'." It should be observed the same court, just previously [R. 76], had dubbed petitioner's preparation a "nostrum." It is easy to pin epithets. But, alone, they are merely question-begging. They supply neither fact nor reasoning. Rather, they tend to indicate bias and prejudice, and a predisposition to neglect or obscure any elements in a case which conflict with such preconceived ideas. True, courts are privileged and empowered to declare their conclusions. But, to render such valid and binding, it is elementary they must derive support from record facts appearing. The requisite fact basis for the above characterizations the Circuit Court did not supply. (Pet. 7-8.) Neither does the brief. (Pp. 4-5.) Both, without analysis, accept superficial conclusions, which cannot be supported.

Noting the "hearing" in *1937*, on the "complaint" "issued" in *1934*, the brief states certain other "facts", "in the Government's complaint" (filed in 1940) [R. 27], "are *undisputed*" (p. 4). These, it undertakes to set forth (p. 5). All such are based on the most superficial aspects

of the record. They appear merely as conclusions. Their actual *factual background or content* is indicated not at all, not even as far as the Circuit Court undertook by quoting some of them. (Pet. 6-7.) There is no analysis or specification. The mere fact of the *existence* of the "complaint", "findings", "order", and the conclusions "found", is, of course, admitted. But the *factual support, validity and effect* of all such is sharply *controverted*, and always has been. (Pet. 3-6, "Judgment", "The Action", "Petitioner's Pleadings", "Motion for Summary Judgment"; 6-11, "Opinion on Appeal.") And this controversy is reiterated, particularized, and supported by authority, in all its various aspects, throughout this petitioner's "Statement of Questions Presented." (Pet. 12-17.)

In particular, the brief's statement (p. 5) of matters "undisputed" *omits* all specification of the subject matter of the "certain specified representations" it mentions, the "misrepresentations" of which constitute the "unfair methods of competition" relied on by the Commission. Presumably, this omission is consonant with the brief's policy, already commented upon, of eliminating that subject matter as any part of its "Questions", particularly "(1)". It is, nevertheless, an essentially indispensable element in this case, since it eventuates in mere matter of *opinion* and not fact, to-wit, the *extent* of "the therapeutic efficacy" of the petitioner's compounded preparation. (Pet. 9-10; 15, "2".)

It is unnoticed the truth or falsity (aside from very customary "puffing"), of the subsequent nine "specified representations" in reality depends upon that of number "(1)": the preparation is "a gland tonic." [R. 5-6, "Order"; 12-13, "Complaint"; see Appendix B hereto.]

Equally unnoticed are the *previous* findings of *fact* [R. 21-23] disclosing the preparation and its content, which themselves, by common knowledge of the time (1937), show it to be "a gland tonic", both in composition and potential efficacy, *even if but one* of its active constituents, thyroid, is considered. (Pet. 5, 9.) This common knowledge of the day is confirmed by the 1937 edition of the United States Dispensatory, p. 1113, a passage from which hereinafter appears as Appendix C. In such case, it would, in any event, be incompetent for the Commission to undertake to forbid that fact being stated either directly or indirectly—merely because it might entertain a differing *opinion* upon the *extent* of therapeutic value existing in the given case. (Pet. 9-10; 15-16, "2"(a) and (b).)

Similarly, it is conspicuously true that the *content* of the *new* advertisements depends upon the capacity of the preparation as "a tonic", "gland tonic", or "gland tablet." This is demonstrated by the analysis in Appendix B hereto. The fact issue as to this was pleaded and tendered by petitioner in his answer herein, and in his opposition to a summary judgment. (Pet. 4-6.) Its rejection by both the District and Circuit Courts is one of the chief grounds of the present proceeding. (Pet. 17, "3," (b).)

Further in particular, the "Statement" (p. 5),—as another thing "found",—says, the "misrepresentations" induced "erroneous belief" which led to purchases of petitioner's preparation, "thereby diverting trade from competitors *who truthfully represent* their preparations," to their "substantial injury." Such is indeed "found"; and in exactly that form. But there is *no affirmative finding* there were *any such* competitors. It is nowhere found that, among the multiplicity of general competitors

claimed, any one of them, in fact, *did* "truthfully represent" his or its "preparation." That any such so did, is left to speculative assumption. The oblique and unsupported clause thus appended to the findings is immaterial surplusage. No "competitor" any more worthy than petitioner is now said to be, is, in fact, "found."

The "Statement's" last paragraph on p. 5, that no "review" was sought, and "the order became final within the meaning of the Act of March 21, 1938", begs some of the most fundamental questions tendered by the petition here. That any "review" was necessary, or that the "order" did, or could, become "final" under the Act cited, is most earnestly controverted throughout. (Pet. 12-14, "1", (a)-(d); 16-17, "2" (a).)

To a paragraph (p. 6) asserting the *new* "advertisement", *"violated"* the "order of April 6, 1937", the Statement appends note "3". The matters thus brought in are not frankly or fairly represented, in any of their aspects.

It is first said, "petitioner admitted the publications * * * but averred the advertisement (*new*) shows *on its face* it did not violate the order", etc., and cites "[R. *29-30*]." The pleading referred to does *not* make such an averment. But that is not all. In the record, petitioner's *affirmative fact defense follows* the above citation, and appears: R. 30-32. The note *omits all this*. It again follows the "pattern", and conceals the fact.

It is then said: "The *issue* of fact *thus* raised, * * * requires for its *determination solely* a comparison of the *words* of the advertisement with the *text* of the Commission's order." This not only *conceals* but *denies* the affirmative fact defense above specified. It also *begs* the question proposed thereby. It *assumes* the court's right

and authority thus to determine "the issue of fact"; and also *assumes* the complete validity of the Commission's order, in both law and fact. All again in the manner of the "pattern."

The note continues, that this "issue of fact" was: "*decided* adversely to petitioner by both the District Court [R. 51] and the Circuit Court of Appeals. [R. 80.]" This statement only repeats the very error of the District and Circuit Courts of which petitioner complains, namely, that the District Court, in the first instance, acted *without* power or authority, by a summary judgment, to *decide* "the issue of fact"; and again *begs* one of the very questions presented by the petition. (Pet. 17, "3" (b).) When the District Court said the matter could be disposed of on the face of the existing record, it merely held there was *no fact issue* presented. It thereby *assumed* to convert the "issue of fact" into *one of law*. But the issue was not so pleaded or presented. It was one strictly of *fact*, namely what was so as "a tonic," "in truth and in fact," [R. 31-32]; and this is confirmed by petitioner's *opposition* to a summary judgment, and his tender of *evidence on a trial*. (Pet. 5-6.) It was groundless assumption by the court, that "defendant does not take the position that this matter cannot be decided by the court on summary judgment." [R. 51.] Petitioner's whole course of pleading controverted any such conclusion. The court simply deprived petitioner of his "day in court" on his fact defense, and thereby committed the error complained of.

The note concludes: "the petition for writ of certiorari *does not request review of this question of fact.*" Just what the brief intends by this is not made clear. It reads like a paraphrase of the District Court's assumption,

quoted above, regarding *decision* of fact issue on motion for summary judgment. In any event, the statement is baseless. Throughout the petition the *grant* of summary judgment in this case is emphasized, the numerous errors involved because of it are separately and systematically specified in a related series, and, in particular, one point is devoted exclusively to the error inhering in the grant, because it was ordered when an issue of *fact* existed *to be determined.* (Pet. 17, "3", (b).) Further to disprove the brief's assertion in this note, it is only necessary to look to a few parts of the petition beside the above citation, as follows: pp. 5-6; 19, "5"; 19, "Conclusion", second line from bottom; 20, Prayer.

Rarely is found so short a paragraph containing so much of misstatement and error as does this note "3".

II.

Criticism of the "Argument."

Heading "1".

Having, as aforesaid, stripped away the substance of the Petition, the brief undertakes an "argument", under heads "1", and "2". (pp. 6-9.) Presumably, these are to relate to the previous two "Questions Presented." The discussion is both curt and cursory. Perhaps it is hoped to capitalize upon the Circuit Court's epithets, of a "frivolous" appeal, on behalf of a "nostrum." Apparently it is assumed this Court will be satisfied with the same superficiality and assumption with which the lower courts have seemed content. But the petition indicates much deeper and more far-reaching questions than the mere rights of this petitioner. Such latter are only incidental to the proper determination of fundamental rights under our

written Constitution, as against those determinations now sanctioned by those courts, in this case.

Under "1" (p. 6), is first stated what: "Petitioner contends (Pet. 15)", namely, that the Commission had no "'jurisdiction'", and its order "is void", "in the absence of *'specific findings of fact establishing injury'* to identified competitors." It is first very observable the brief's statement here is *not* that of its question "(1)" (p. 2.) There, what is said relates to *"a finding of specific injury* to identified competitors." The brief seems not to bear in mind even its own language.

But much more importantly, the part of the above in *single* quotation and there emphasized is accurately reproduced from the petition; but the remainder is not. Instead, the petition says: "to identified *competition* and identifiable competitor." (Pet. 15, "2", (a).) There is a vitally important difference. The point of the petition is, that there must be specific findings of *actual competition* with the *particular preparation* in question, whereby anyone engaging in *that competition* was, or would be, injured by any "unfair methods" employed by a defendant in the course of that competition. This is the doctrine of *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 651-654 (1931), which remained the law on this subject matter until the *1938* amendment of the Act of 1914; and therefore governs this case, in this aspect. It must be remembered this action is based on an *order* of the commission issued in *1937*, in a proceeding originated in *1934*. Very significantly, the above amendment, by *one* part of its provisions, completely altered this aspect, by *dispensing* with findings of *competition* when *"deceptive* acts or practices" are involved, and particularly in respect

to *"false advertisement"*, "to induce, the purchase of drugs," *et al.* (15 U. S. C. A. secs. 45 (b), 52 (a) and (b).) See Appendix A, notes 1 and 2. Obviously, this gave *fundamentally new jurisdiction* to the Commission. Else, the legislation was a vain and futile act, in this respect. (See "The Wheeler-Lea Act," Introduction, Charles Wesley Dunn. New York, 8/15/38.)

Next (p. 6), it is said: "the contention is *not timely*": because, under the *1938* amendment, the "order has become *final*"; and "petitioner failed to petition for *"review"*, as required by that amendment. In this, the brief only succeeds in again begging some of the most fundamental questions raised in the petition: whether the "order" in question was, or could become, "final"; and whether any "review" would be required in such a case as this. (Pet. 12-14, "1", (a)-(d); 16-17, "2", (a).)

Then (p. 7), it is said: "the contention is *without merit* and has been *squarely rejected* by this court." *Federal Trade Comm. v. Raladam Co.* (86 L. ed. (Adv. Ops.) 926 (2nd Raladam case) (1942), is cited, and the following is added: "See also Federal Trade Comm. v. Raladam Co., 283 U. S. 643, 651" (1931) (1st Raladam case).

These citations seem inconsistent; and incongruous and without bearing, for any purposes of the brief. The *second* case expressly *distinguishes* the first. Quoting the latter (p. 653 (3)), it then says: "Hence, these reasons are *not controlling* in this case, arising as it does out of *different* proceedings and presenting different facts and a different record for our consideration."

Then, after noting "hearings" and "much evidence" concerning "trade methods" since the earlier order, it is

said: *"This time* the Commission *found with meticulous particularity"* actual "competition", in *"fat reducing remedies"*, and actual and potential competitors.

In this connection, it appears that, in preparation for the 1935 Raladam proceeding, the Commission "developed evidence of 26 competitors". (Hearings before the Committee on Interstate and Foreign Commerce on H. R. 3143, 75th Cong. 1st Sess. (1937), page 11.)

In contrast, and negativing the brief's assertion (p. 7), the present findings show nothing "closely parallel", either "in form" or "substance". Nothing is here "found with particularity", "meticulous" or otherwise. All that is stated are the broad general conclusions of competitors and competition [R. 21], substantially and almost literally as charged in the complaint. [R. 12.] (Pet. 7-8; 15, "2" (a).)

Such latter condition, however, is "precisely parallel" to what the record showed in the *first Raladam* case, *supra*; certainly so "in substance".

Inasmuch as under the Act of 1914, the Commission was under mandatory requirement that, after hearing and before issuing its order: "it *shall* make a report in writing in which it *shall state* its findings as to the *facts*" [Appendix A, p. 1], it is necessarily to be presumed, since it was jurisdictional, that the Commission fully performed its duty in this case, and made its report, as to the *facts*, reflect fully *all facts* that were actually developed by the hearing. The general form and tenor of all the findings that appear [R. 19-26] confirm this. The case was stated in the findings as fully as it appeared. There was only *opinion and assumption*, which was wholly insufficient.

The brief's statement (p. 7), concerning what "petitioner seems to contend (Pet. 15-16)" in respect to the Commission's lack of jurisdiction "upon findings as to the remedial efficacy of a patented preparation", is inaccurate and inadequate; and its closing words: "The two Raladam cases * * * *clearly dispose* of this contention", are without bearing here, as likewise are the cases cited in appended note "4",—for the reason that no one of them is in point, in view of the *questions* therein determined.

Wherein the above statement is inaccurate and inadequate has hereinbefore been shown, in criticism of the brief's "Question (1)", and again of its "Statement" in respect to the content of "certain specified representations" and the correspondent alleged "misrepresentations". Petitioner's point is, that, in this case, upon the findings here appearing, the findings of "unfair methods" amount only to an expression of *opinion*, not fact, as to the *extent* of *"the* therapeutic *efficacy"* of the petitioner's preparation. (Pet. 8-10: 15-16, "2" (b) and (c).)

Of the brief's citations, the *first Raladam* case, 283 U. S. 643, at 647, for the purposes of its decision, expressly *assumes* "the first and third of these prerequisites" of jurisdiction in the Commission, and considers and determines only "the second", *i. e.*, "methods of *competition* in commerce". (Italics the court's.) *No decision*, therefore, is announced on any question of the content of the "methods" involved. In the *second Raladam* case, the Circuit Court, 123 F. (2d) 34, at 36 (1,2), expressly recognized this limitation, and rendered its decision accordingly. And this Court, in reversing the Circuit Court and *directing* an *affirmance* of the Commission's order, held only: "The *findings* * * * should have been *sustained* against the *attack made* upon them" (86 L. ed. (Adv. Ops.)

926, 928-929), and further said: "The respondent has *not* sought in this Court to sustain the judgment * * * on *any other* ground."

Regarding the second *Raladam* case in the Circuit Court, an oversight is noted in the petition (p. 15), where the citation is "42F(2) 430." It is as above, 123 F. (2d) 34.

Of the citations in note "4", *supra, E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 77 F. (2d) 886, 887-888, deals with an *article*, "bath salts", advertised as "imported from England" (which it was not), and "equal to treatment at spas" (which it was not since such latter included supervised regimen of diet and exercise). These were "*found* misstatements of *fact* and misleading"; and it was also found "these salts" were in competition with "all other bath salts". The authority relied on is the *first Raladam* case, *supra* (the *limitation* of which decision has just been noted), and *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 493, which involved "Australian" or adulterated wool *passed off* as pure wool. This is the first of the line of cases dealing with the *passing off* of a concrete *article or thing* as something else. This, or like cases, certainly present no analogy to one where an *opinion* of the *extent* of *"the therapeutic efficacy"* of a compounded medicinal preparation is alone involved, such as the present. (Pet. 9-10.) The Commission itself, in the hearings before the House Commerce Committee prior to the 1938 amendment, entertained the same view. It appears that, in claiming jurisdiction over all advertising, in any form, the Commissioner speaking, Judge Davis, made the very qualification, thus: "I mean of *articles* sold in interstate commerce";—thus truly reflecting the state of the law. (Hearing, House Committee

on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (1937), p. 58.)

The other case in note "4", *supra, Alberty v. Federal Trade Commission,* 118 F. (2d) 669, 670, is *based* on the 1938 *amendment;* therein *"competitors"* were "conceded"; and "the *entire* order" was *not* attacked. It clearly can have no pertinency to what the present record presents *under the act of 1914.* Here, the *whole order* is challenged on its own findings, and the Commission's *jurisdiction* is challenged as well. But, if the case could be considered, it would be helpful to petitioner, rather, than harmful. The opinion of the concurring judge throws some light on matters of *opinion* as ground of jurisdiction in the Commission, at any time.

Heading "2".

The brief's statement here (p. 7): "Petitioner appears to contend (Pet. 13)", that the amendment, "since (it) provides *a penalty* for violating *orders* * * *, it *unconstitutionally* vests *judicial power* in the Commission", is wholly erroneous, in every respect. In the first place, such a statement begs one of the primary questions in this case: whether there *is* any "order" here, subject to *violation.* (Pet. 15-16.) But, more than that, petitioner does not contend as stated. The thrust of his attack here is much deeper and more far-reaching. It goes to the very foundation of our American system, to the integrity of our written constitutional government, and to the preservation of those rights and freedoms which we believe to be our aegis as free men. (Pet. 12-14.) All these, petitioner contends should not be imperilled, upon the plea of an exigency in the face of multifarious complicated governmental activities and demands, however

well-founded such plea may be. On the contrary, petitioner contends all purposes may be served at the same time, by due attention to the necessary "checks and balances" to guard against the ever-present proclivities of human nature; and he further contends that existing principles, in established precedents, point the way. On such principles, he has built the structure of his entire petition.

Speaking to the brief's language on page 8, let it be conceded Congress may constitutionally provide penalties as means of enforcing an administrative order, after such an order has in some manner become *final;* and that such finality may be conditioned upon a judicial *review* within a term. But, petitioner's points thereupon are, that the administrative order must first be *valid;* that to be so, it must have been issued *within* the administrative agency's *limited jurisdiction;* that such an agency may *not,* constitutionally, exercise or be authorized to exercise *"constitutional judicial power",* or determine its own jurisdiction, because such involves the interpretation and construction of Federal legislation and the Federal Constitution. (Pet. 12-14, "1" (a), (b), (c); "2" (a), (b), (c).) It is cheerfully conceded, as the brief states (p. 8), the mere "imposition of a penalty to secure enforcement, * * * does not convert the (Commission's) order into the equivalent of a court decree". It is the very point of petitioner's contentions that it could not constitutionally do so, and particularly not in this case. (Pet. 12-14, "1" (a), (b), (c).) But the brief's statement implies that "the order" has issued *within* the Commission's jurisdiction, and is therefore *valid.* Both of these implications petitioner squarely repels and controverts in this case. (Pet. 15-16,

"2".) So also of the further statement (p. 8): "The statute only provides a remedy for *enforcement* if," (there is *no*) *"court proceeding* to set the order aside." The brief's citations support these statements. But two of them involve *gambling* devices and rest upon *public policy* against such. Neither involves any question of the order's *invalidity* on account of the form of the findings on which it rested. *Osler Candy Co. v. Federal Trade Commission,* 106 F. (2d) 962, 964, announces the doctrines the brief states, and relies on *National Candy Co. v. Federal Trade Commission,* 104 F. (2d) 999, 1004, also cited by the brief in an appended note "5" (p. 8). The latter case (p. 1004) declares the Commission is no more than "a *quasi-judicial* tribunal", and "its orders are *administrative orders* as *distinguished* from *judicial decrees".* This is all in accord with petitioner's contentions. (Pet. 12-13, "1" (a), (b).) The last case in note "5" (p. 8), *Ritholz v. March,* 105 F. (2d) 937, 939, was for *injunction* to stay a *pending proceeding* by the Commission, on the ground the 1938 amendment had *repealed* the Act of 1914; and this was denied. What the charges in the proceeding were is not disclosed.

The brief cites "Packers and Stockyards Act of August 15, 1921," (7 U. S. C., secs. 195, 207 (g), (h), 215 (a)) and "Interstate Commerce Act as amended" (49 U. S. C., secs. 1 (17), 16 (8)), as instances of *penalties* provided after *failure* to review. But the brief does not observe that *St. Joseph Stock Yard Co. v. United States,* 298 U. S. 38, for an *injunction,* arose under the Packers and Stockyards Act. (See Pet. 13, "1" (b), and 14, "1" (c).) It may be noted part of this case (pp. 49, "Third", to 54, "Fourth") was read, *in toto,* into the record of the Congressional proceedings eventually leading to the 1938

amendment, along with a reference to *Curtis Pub. Co. v. Federal Trade Commission,* 270 F. 881, affirmed 260 U. S. 567. (Cong. Rec., 74th Cong., 2nd Sess., p. 6601.)

The brief also does not observe that, under the "Interstate Commerce Act", "it has been settled that the *orders* of the Commission are *final unless* (1) *beyond* the power it could *constitutionally* exercise; or (2) beyond its *statutory* power; or (3) based upon a mistake of law". *(Int. Com. Comm. v. Un. P. R. Co.,* 222 U. S. 541, 547.) And this *finality* did not prevent this court from affirming an *injunction* against an order of the Commission, on the ground the Commission had erred in its interpretation of the *facts* in the matter of a "rebate". *(Int. Com. Comm. v. Diffenbaugh,* 222 U. S. 42, 45-46.)

The brief (pp. 8-9) next asserts the 1938 amendment's provision for "judicial review", "satisfies the requirements of due process". It is not stated *what* "due process" is intended. In such connection, the "requirement" has *two* meanings: the due process of the administrative system, when there is *no challenge* to the agency's jurisdiction; and the "due process" of the Fifth Amendment to the Constitution or that required to determine questions within the Bill of Rights. There is a wide difference. (Pet. 13-14, "1" (b), (c).) This difference is recognized even in the case which the brief cites (p. 9), *Phillips v. Commissioner,* 283 U. S. 589, 596-597. That case involved the summary collection of a *tax assessment,* and the validity of the statutory method was sustained as affording due process. But, as a premise, it is said: "The right of the United States to *collect its internal revenue* by *summary administrative* process has long been settled" (p. 595); and, in sustaining the process as "due" under the circumstances, the court was careful to say that

the principle applied: "save as there may be an *exception* for issues presenting *claims of constitutional right*". (p. 600.)

The brief closes (p. 9) with the "pattern" statement that "petitioner's contention", regarding "an *ex post facto* penalty is equally without merit", because "his *violations* were subsequent" to the amendment. Thus again, is misapprehended or ignored the point petitioner really makes. (Pet. 10-11; 14 "2" (d).)

Conclusion.

It is respectfully submitted respondent's brief affords nothing but additional grounds and reasons for grant of certiorari in this case.

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APPENDIX A.

Federal Trade Commission Act, 1914.
(38 Stat. 717, 719.)

(Emphasis and paragraph numbering supplied and notes added.)

Sec. 5. (1) That unfair methods of competition in commerce are hereby declared unlawful.

(2) The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

(3) Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using *any unfair method of competition*[1] *in commerce*, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such

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[1]Note. At this point, the 1938 amendment inserted "*or deceptive* acts or practices"; and following the last (11th) section of the 1914 Act, added 7 new sections (12-17). (15 U. S. C. A. 45-58.) Section 5, *supra*, was divided into 12 subsections incorporating some changes and additions. (*Id.*, sec. 45 (a)-(*l*).) The insertion noted is in subsection (b). *New section 12* (*Id.*, sec. 52) provided:

"Sec. 12(a) *It shall be* unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, *any false advertisement*—

(1) By United States mails, or *in commerce by any means*, for the purpose of inducing, or which is likely to *induce*, directly or indirectly the *purchase* of food, *drugs*, devices or cosmetics; or

(115) (2) By *any means*, for the *purpose of inducing*, or which is likely to induce, directly or indirectly, the *purchase* in commerce of food, *drugs*, devices or cosmetics.

(Continued on following page.)

person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the *violation* of the law *so charged in said complaint.* Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, *it shall make a report in writing in which it shall state its findings as to the facts,* and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of com-

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(b) *The dissemination* or the causing to be disseminated of any *false advertisement* within the provisions of subsection (a) of this section *shall be an unfair or deceptive act or practice* in commerce within the meaning of *section 5.*"

The authority for, and the extent of the court's jurisdiction of, actions by the Government on orders of the Commission, is each conferred by *new* subsection *(l)* of Section 5, supplemented by *new* Section 16, which latter authorizes the Attorney General to proceed, upon certification of "the facts" by the Commission. *(Id.,* Secs. 45 *(l)* and 56.) Subsection 45 *(l)* is quoted in the Government's brief, p. 3. The expressed limitation of both the authority for and the jurisdiction of such an action, on such an order, is:

"*after* it has become *final,* and *while* such order is *in effect*". (*Id.,* 45 *(l).*)

petition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

(4) If such person, partnership, or corporation *fails or neglects* to obey such order of the commission while the same is in effect, the *commission* may apply to the *circuit court* of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the *enforcement of its order,* and shall certify and *file* with its application a *transcript of the entire record* in the proceeding, including *all the testimony* taken and the report and order of the commission.[2] Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. *The find-*

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[2]Note. Subsection *(l)* was added at the *end* of original Section 5.

With *new* Section 16, it replaced this provision (par. (4)) of the original Act, for "*enforcement*" of orders. The provisions of the remainder of this paragraph and of the succeeding (5), relating to "*review*" and to the *finality* of orders, are replaced in new subsections of Section 5. (15 U. S. C. A. sec. 45 (b), (c), (g).) In particular, subsection (g), (1), makes the Commission's orders "final", *inter alia,* if there is no "review" within "the time allowed".

ings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, the court may order such additional evidence to be taken before the commission, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The *judgment* and decree of the *court* shall be *final,* except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

(5) *Any party* required by such order of the commission to cease and desist from using such method of competition may *obtain a review* of such order in said *circuit court* of appeals by filing in the court a written *petition* praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the *commission* forthwith shall certify and *file* in the court *a transcript* of

the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the *findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.*

(6) The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

(7) Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

APPENDIX B.

Analysis of the Alleged False Advertising as It Is Made to Appear in the Successive Stages of the Commission's Proceeding, and a Comparison with New Advertisements Relied on in the Government's Complaint.

Commission's Complaint:

"(1) Said 'Glendage' is a gland tonic; (11)

(2) Said 'Glendage' restores vigorous health;

(3) Said 'Glendage' is the best gland remedy known;

(4) Said 'Glendage' constitutes a remedy for glands;

(5) Said 'Glendage' is the last word in modern science;

(6) Said 'Glendage' stimulates all the glands to healthy activity;

(7) Said 'Glendage' is entirely unlike other so-called gland remedies;

(8) Said 'Glendage' stands superior to a tonic;

(9) Said 'Glendage' is a wonderful remedy for cases of nervousness or overwork, or lack of vim, or lack of vigor; and

(10) Said 'Glendage' will return one to the full vigor of manhood or womanhood,". [Tr. 12-13.]

Commission's Findings:

"Paragraph Four." "It is represented and implied:

(1) "*that* the said preparation Glendage is a gland tonic;

(2) *that* it will restore vigorous health;

(3) *that* it is the best gland remedy known;

(4) *that* it constitutes a remedy for glands;

(5) *that* it is the last word in 'modern science' *in gland remedies* and stimulates all of the glands to healthy activity;

(6) *that* it is entirely unlike other so-called gland remedies;

(7) *that* it stands superior to all other tonics as a tonic;

(8) *that* it is a remedy for cases of nervousness, overwork, lack of vim and lack of vigor;

(9) *that* it will return one who does not possess the full vigor of manhood or womanhood to such a state;

(10) *and that such preparation Glendage is a competent and effective treatment or corrective for use in remedying the ailments and conditions mentioned.* (24.)" [Tr. 25.] (The numbering above appearing is supplied.) (Emphasis supplied.)

Commission's Order:

"'1. That said preparation is a gland tonic;

'2. That said preparation will restore vigorous health;

'3. That said preparation is the best gland remedy known;

'4. That said preparation constitutes a remedy for glands;

'5. That said preparation is the "last word" in "modern science" *in gland remedies,* and stimulates all the glands to healthy activity;

'6. That said preparation is entirely unlike other so-called gland remedies;

'7. That said preparation stands superior as a tonic;

'8. That said preparation is a remedy for cases of nervousness, overwork, lack of vim and lack of vigor;

'9. That said preparation will return one to the full vigor of manhood or womanhood;

'10. *That said preparation is a competent and effective treatment or corrective for use in remedying the ailments and conditions hereinabove mentioned.*' (5)" [Tr. 5-6.] (Emphasis supplied.)

New Advertisements in the Government's complaint:

"Money-Back

Gland Tablet

Calls for Trial

"Every cent will be refunded if results from Glendage are unsatisfactory. That's how sure we are that we have *one of the best gland tablets known.* Thousands of tests have proven this to our full satisfaction. You, too, may prove it without risking a penny.

"Glendage, in convenient tablet form, is the private prescription of Jos. A. Piuma, Graduate Pharmacist. It contains the extracts from the glands of healthy animals (7) and its purpose is *to help stimulate* all the glands to healthy activity. You will be surprised at its *invigorating action.* Vigorous health is necessary for success in all activity today.

"*Asthma,* Diabetes, Rheumatism, Constant Tiredness, Low Blood Pressure, Prostate Gland Trouble, Nervousness and others are ailments *frequently caused* by gland disorders.

"You owe it to yourself and family to try this *new gland tablet.* It is a *real gland product* and carries an un-

limited money-back guarantee if it does not give complete satisfaction. 30-day treatment, $3.00." [Tr. 8-9.]

The parts constituting *representations* are *italicized.*

It is at once obvious that Nos. 5 and 10 in the Findings and Order *depart* from those charged in the Commission's Complaint. The new 5 consists of original 5 and 6, with *"in gland remedies"* interpolated between. No. 10, being thus vacated, is supplied by *wholly new matter.* (Pet. 8-9.)

Comparison:

The Commission made special findings. [Tr. 21-23.] These with cited matters show it contained *glandular* substances sufficient to entitle it to rate as a *tonic* to at least *some extent,* and any purported finding otherwise is mere matter of the Commission's *opinion.* Hence, *such* representation could neither be false, nor be denied to appellant. (Pet. 9.) Bearing this in mind, each numbered item in the *Commission's complaint* will be compared with what was published in 1938, 1939 and 1940, reproduced in full, *supra.* What is stated in the *"Order"* in the present Government's complaint [Tr. 5-6], appears wholly immaterial; since its *departure* from the original charge is shown,—also on the face of *Government's* complaint,—by the exhibited complaint of the *Commission.* [Tr. 12-13.] The result is this:

1. *"a gland tonic".*

This, as above, the Commission itself showed,—by its own special findings of content,—could not be validly forbidden, since the preparation was "a gland tonic",—

by its content of glandular substances, and its indeterminate potential as "a tonic". "Gland tablet" is its equivalent.

2. *"restores* vigorous health".

This appears only as *"help to stimulate"*, which is true for the reasons just stated.

3. "the *best* gland remedy *known*".

This appears only as *"one* of the best", thus not excluding any others; and merely "puffing" the preparation, which, by common knowledge, even now is the universal practice, particularly in this field of endeavor.

4. "constitutes *a remedy* for glands".

This is proper and admissible for the reasons appearing under 1, ***supra.***

5. *"the last word in modern science".*

This is *wholly omitted.*

6. *"stimulates all the glands* to healthy activity".

This is changed to *"helps* to stimulate", which is admissible for the reasons appearing under number 1.

7. *"is entirely unlike other so-called gland remedies".*

This is *entirely omitted.*

8. *"stands superior to a tonic".*

This is *entirely omitted.*

9. *"a wonderful remedy for nervousness or overwork, or lack of vigor".*

This is *wholly omitted.* Its only approach lies in the statement that a number of "ailments", headed by *"Asthma"*, and ending with *"Nervousness"*, are *frequently caused by gland disorders"*.

At least some of the diseases, *e. g.*, "asthma", are *directly* within the terms of United States Dispensatory (1937 Ed.). See Appendix C, post.

10. *"will return one to the full vigor of manhood or womanhood."*

This is *wholly omitted.*

Resulting from this comparison, the new advertisements in question show *no violation* of the order, *provided only* it still remains true, that the appellant's preparation is what the Commission's special findings indicate it to be: a tonic, of at least some valuable potency. Based upon this state of therapeutic fact, derivable mostly from experience, all the other statements appearing are but legitimate and common "puffing", make no fantastic claims, and make no invidious comparisons with any other preparation or remedy. The *full truth* of this *fact issue* remained to be *tried* out in full; and the summary judgment precluded any such.

APPENDIX C.

United States Dispensatory, 1937 Edition, p. 1113.

"The thyroid gland is one of those organs, called endocrine, which furnish an internal secretion necessary for the *health of the body.* * * * The administration of the thyroid body or its active principle to healthy animals causes an increase in the *metabolism* with consequent tendency for elevation of the temperature, and a loss of body weight. * * * *In addition* to these states in which the drug is obviously of value, it has been used in a more or less empiric manner in *a large number of other disorders.* There are *indeed few* diseases, either acute or chronic, for which the thyroid gland has not been recommended by someone. Among these conditions in which there is more or less suggestive evidence of its usefulness may be mentioned uterine disorders, especially metorrhagia; various forms of nephrosis (see McClendon, J. A. M. A., 1930 XCIV, 1202); diseases of the bones as ununited fractures, osteomalacia, and theumatoid arthritis, certain skin diseases, especially psoriasis; *hay fever, asthma,* etc. * * *"